(3)

No. 90-1843

Supreme Court, U.S.
FILED
JUN 27 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

BLUE CROSS AND BLUE SHIELD OF MARYLAND, INC.,

Petitioner,

v.

ROBERT WEINER, SR., MARGARET WEINER, MARK WEINER, and ROBERT WEINER, SR., as Personal Representative of the Estate of Steven Weiner,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

LARRY S. STEWART
Counsel of Record
JAMES B. TILGHMAN, JR.
STEWART TILGHMAN FOX & BIANCHI, P.A.
44 West Flagler St.
Suite 1900
Miami, Florida 33130
(305) 358-6644
Attorneys for Respondents

June 27, 1991

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Fourth Circuit erred in declining to permit a collateral attack on the basis of *Kalb v. Feuerstein*, 308 U.S. 433 (1940), against a state court ERISA preemption determination that Congress intended the state court to make.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 9

1. The Decision Below Neither Effectively Overrules *Kalb v. Feuerstein* Nor Raises Significant Questions of Federal Law 9

2. The Decision Below Does Not Conflict With Existing Federal Law 18

3. The Decision Below Does Not Hinder Federal Review of State Court ERISA Preemption Determinations 20

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Alleghany Corp. v. Kirby, 340 F.2d 311 (2d Cir. 1965), *cert. dismissed*, 384 U.S. 28 (1966) 19

Aluminum Co. of America v. Utilities Comm'n of North Carolina, 713 F.2d 1024 (4th Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984) 5

Amalgamated Clothing Workers of America v. Richman Brothers, 348 U.S. 511 (1955) 20

Baggett v. Department of Professional Regulation Bd. of Pilot Comm'rs, 717 F.2d 521 (11th Cir. 1983) 5

Barry v. Dymo Graphic Systems, Inc., 394 Mass. 830, 478 N.E. 2d 707 (Mass. 1985) 14

Blue Cross and Blue Shield of Maryland, Inc. v. Weiner, 868 F.2d 1550 (11th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 239 (1989) 1, 5, 16

Browning Corp. Int'l v. Lee, 624 F.Supp. 555 (N.D. Tex. 1986) 13

Bruenn v. Aetna Life Ins. Co., 197 Cal. App. 3d 1000, 243 Cal. Rptr. 262 (Cal. App. 2 Dist. 1987) 14

Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988) 21

Consolidated Rail Corp. v. Illinois, 423 F.Supp. 941 (Regional Rail Reorg. Ct. 1976), *cert. denied*, 429 U.S. 1095 (1977) 15

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) 5, 6

Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982) 7

Dowell v. Applegate, 152 U.S. 327 (1894) 10

TABLE OF AUTHORITIES – Continued

Page

Durfree v. Duke, 375 U.S. 106 (1963) 16

E-Systems, Inc. v. Taylor, 744 S.W. 2d 956 (Tex. App. – Dallas 1988) 14

FMC Corp. v. Holliday, ___ U.S. ___, 111 S. Ct. 403, 112 L.Ed.2d 356 (1990) 21

Fresh Int'l Corp. v. Agricultural Labor Relations Bd., 805 F.2d 1353 (9th Cir. 1986) 5

Hathorn v. Lovorn, 457 U.S. 255 (1982) 14

Hobbs v. United States Offices of Personnel Management, 485 F.Supp. 456 (M.D. Fla. 1980) 19

Hood v. Prudential Ins. Co. of America, 522 So.2d 265 (Ala. 1988) 14

In Re Ross, 81 B.R. 473 (Bkrty N.D. Ill. 1988) 20

Ingersoll-Rand Co. v. McClendon, 498 U.S. ___, 111 S.Ct. 478, 112 L.Ed. 2d 474 (1990) 21

International Longshoremen's Ass'n v. Davis, 476 U.S. 380 (1986) 8, 13, 14

Johansen v. Employee Benefit Claims, Inc., 668 F.Supp. 1294 (D. Minn. 1987) 13

Kalb v. Feuerstein, 308 U.S. 433 (1940) ..... *passim*

Kanne v. Connecticut General Life Ins. Co., 867 F.2d 489 (9th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989) 8

Mackey v. Lanier Collections Agency & Service, 486 U.S. 425 (1988) 15

Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985) 17

TABLE OF AUTHORITIES – Continued

Page

Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) 13, 14, 21

Peick v. Murray, 141 Ill. App. 3d 1081, 491 N.E. 2d 100 (Ill. App. 1 Dist. 1986) 14

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) ... 6, 9, 13

Providence Hosp. v. National Labor Union Health and Welfare Fund, 162 Mich. App. 191, 412 N.W. 2d 690 (Mich. App. 1987) 14

Richland Hosp. Inc. v. Ralyon, 33 Ohio St. 3d 87, 516 N.E. 2d 1236 (Ohio 1987) 14

Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) 5, 6

Simmons v. Diamond Shamrock Corp., 844 F.2d 517 (8th Cir. 1988) 20

Stoll v. Gottlieb, 305 U.S. 165 (1938) 10

Takeda v. Northwestern Nat'l Life Ins. Co., 765 F.2d 815 (9th Cir. 1985) 13

Texaco, Inc. v. Pennzoil Co., 784 F.2d 1133 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1987) 19

Texas Employers' Ins. Assoc. v. Jackson, 820 F.2d 1406 (5th Cir. 1987), *modified on reh'g*, 862 F.2d 491 (1988) 18

Transamerica Occidental Life Ins. Co. v. Digregorio, 811 F.2d 1249 (9th Cir. 1987) 12

Turnbow v. Pacific Mut. Life Ins. Co., 765 P.2d 1160 (Nev. 1988), *cert. denied*, 490 U.S. 1102 (1989) 14

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ..... *passim*

Frazier-Lemke Act, 47 Stat. 1470 *as amended* 49 Stat. 942 .....11, 15

Full Faith and Credit Act, 28 U.S.C. § 1738 9

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* 18

National Labor Relations Act, 29 U.S.C. § 151 *et seq.*..... 13

Regional Rail Reorganization Act, 45 U.S.C. § 701 *et seq.*..... 15

Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*..... 19

TREATISES AND ARTICLES

Boskey & Braucher, *Jurisdiction and Collateral Attack*, 40 Colum. L. Rev. 1006 (1940) 17

Moore, *Collateral Attack on Subject Matter Jurisdiction: A Critique of the Restatement (Second) of Judgments*, 66 Cornell L. Rev. 534 (1981)..... 17

1B *Moore's Federal Practice*, § 0.405 [4.-1] (2d ed. 1991)..... 18

18 Wright, Miller & Cooper, *Federal Practice & Procedure*, § 4428 (1981).....17, 18

No. 90-1843

In The

Supreme Court of the United States

October Term, 1990

BLUE CROSS AND BLUE SHIELD
OF MARYLAND, INC.,

Petitioner,

v.

ROBERT WEINER, SR., MARGARET WEINER,
MARK WEINER, and ROBERT WEINER,
SR., as Personal Representative
of the Estate of Steven Weiner,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

Petitioner omitted from its list of prior opinions *Blue Cross and Blue Shield of Maryland, Inc. v. Weiner*, 868 F.2d 1550 (11th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 239 (1989), which disposed of the first collateral attack in this case.

STATEMENT OF THE CASE

Blue Cross and Blue Shield of Maryland, Inc. ("BCBSM"), is now in its eleventh court in this dispute, an odyssey which includes two prior petitions for a writ of certiorari to this Court. Five of these courts – the United States District Courts for the District of Maryland and the Southern District of Florida, the United States Courts of Appeals for the Fourth and Eleventh Circuits, and this Court – have rejected BCBSM's argument that it is entitled to collaterally attack the 1986 Florida judgment in this case.

Undeterred, BCBSM claims that "great judges" and "scholars" would recognize its right to collaterally attack, and that review of the most recent decision against it is appropriate because it calls into question the federal courts' power to review state court preemption determinations under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001 *et seq.*, the continued vitality of *Kalb v. Feuerstein*, 308 U.S. 433 (1940), and thus the proper balance between principles of *res judicata* and exclusive federal jurisdiction. As will be set forth below, however, none of these concerns are raised by the Fourth Circuit's decision. The issue below was not whether federal review of the Florida courts' ERISA preemption determination was available, but whether a collateral attack would be permitted to review it again. And not whether *Kalb* remains vital, but whether its holding could be stretched to authorize a collateral attack against state court action intended rather than forbidden by Congress.

In 1982, Respondent Robert Weiner, Sr., purchased health insurance for his family from BCBSM. That summer, one of his sons, Respondent Mark Weiner, became a quadriplegic in a fall. At about the same time another son, Steve, became ill and was diagnosed as having AIDS. Steve would also become paralyzed before he died.

The boys' health care needs were staggering, but for almost a year they were met with BCBSM's coverage. Then in 1983 BCBSM terminated both boys' insurance. The termination was predicated upon fabricated coverage defenses, and upon terms contained in the master policies which were intentionally more restrictive than the coverage representations BCBSM made in the benefits book it provided the Weiner family (collectively "Weiners") when the policy was sold. Without insurance coverage, the family subsisted in a trailer with Mr. and Mrs. Weiner trying to give round-the-clock care to their two paralyzed sons, one dying. The ordeal they went through cannot, and fortunately need not, be described in the limited space available here.

In 1984, the Weiners filed suit against BCBSM in Florida state court. After more than two years of discovery the case went to trial on the Weiners' claims of fraud, intentional infliction of emotional distress and negligence. The jury returned a verdict against BCBSM on all counts and awarded $500,000 in compensatory and $5,000,000 in punitive damages.[1] A final judgment was

---

[1] The reference to a $5,000 compensatory award in the Fourth Circuit's opinion (App. A. at 3) is a typographical error.

(Continued on following page)

entered by the Florida trial court in the fall of 1986. The issue of ERISA preemption was never raised.

BCBSM appealed the state trial court judgment to the Florida appellate court in 1987. For the first time, BCBSM contended that the Florida courts lacked subject matter jurisdiction because the Weiners' tort claims were based upon the improper processing of claims for benefits under an employee benefit plan, and thus were preempted by ERISA. BCBSM asked the Florida appellate court to decide the issue on the record before it.

In April of 1988, some 18 days before oral argument was to take place in the Florida appellate court, BCBSM launched its first collateral attack by filing an action for declaratory and injunctive relief and a motion for preliminary injunction in the United States District Court for the Southern District of Florida. BCBSM asked the district court to declare the Florida state court judgment void and unenforceable, and to temporarily and permanently enjoin the Weiners from taking any further action in the Florida appellate court – all on the basis of the same ERISA preemption and collateral attack arguments it makes before this Court.

The district court afforded BCBSM an emergency hearing, received extensive memoranda, and denied the

---

(Continued from previous page)

The Weiners also sued BCBSM's servicing agent, Blue Cross and Blue Shield of Florida, Inc., and recovered a separate judgment of $200,000 in compensatory and $1,500,000 in punitive damages. The judgment against Blue Cross of Florida was subsequently reversed because of insufficient evidence to support the intentional tort verdicts.

preliminary injunction. In addition, the district court abstained. While abstention is inappropriate in the face of a claim of federal preemption that is plain, obvious or readily apparent, *see, e.g., Fresh Int'l Corp. v. Agricultural Labor Relations Bd.*, 805 F.2d 1353 (9th Cir. 1986); *Baggett v. Department of Professional Regulation Bd. of Pilot Comm'rs*, 717 F.2d 521 (11th Cir. 1983); *Aluminum Co. of America v. Utilities Comm'n of North Carolina*, 713 F.2d 1024 (4th Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984), the district court found on the evidence before it that ERISA preemption was "a far cry from being 'readily apparent' ".

BCBSM appealed the district court's decision to the United States Court of Appeals for the Eleventh Circuit, arguing, *inter alia*, that it was entitled to collaterally attack the Florida judgment under the principles of *Kalb*. The Eleventh Circuit affirmed the district court's decision to abstain, and ordered the case dismissed based upon the *Rooker-Feldman* doctrine[2] and a finding that the "Florida appellate court is an appropriate forum for determining whether the state trial court had jurisdiction. . . . " *Blue Cross and Blue Shield of Maryland, Inc. v. Weiner*, 868 F.2d 1550, 1555-1556 (11th Cir. 1989). The Florida appellate court decision was before the Eleventh Circuit when it denied BCBSM's suggestion for rehearing in banc.

---

[2] This *res judicata* related doctrine, named for the Court's decisions in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), and *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), provides that in our federal system review of federal questions decided by state courts is the exclusive province of this Court and may not be accomplished through collateral attacks in the lower federal courts seeking declaratory or injunctive relief.

BCBSM petitioned this Court for a writ of certiorari to the Eleventh Circuit in August of 1989. In addition to arguing that the *Rooker-Feldman* doctrine was inapplicable, BCBSM and the Weiners joined issue on the same question BCBSM now presents – whether *Kalb* sanctions a collateral attack on a state court judgment based upon an allegation that the state court incorrectly determined that its subject matter jurisdiction was not preempted by ERISA. This Court denied the petition for writ of certiorari on October 10, 1989. ___ U.S. ___, 110 S. Ct. 239 (1989).[3]

Meanwhile, the Florida appellate court, which was never informed of the attempt to halt its deliberations in federal court, rendered its decision on April 26, 1989. The court acknowledged *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), as controlling precedent, but held that its subject matter jurisdiction was not preempted by ERISA because there was no employee benefit plan. (App. C. at 38).

The court's holding was based on the fact that there was no plan established or maintained by an employer or association or employers within the meaning of ERISA.

---

[3] In footnote 5 of its Petition BCBSM attempts to distance itself from its first collateral attack by incorrectly suggesting that the only question then was whether the Florida state court proceedings could be halted, not whether they could be collaterally attacked. While the fact that state appellate proceedings were ongoing raised certain discrete issues, like the propriety of abstention, since a final state court judgment had already been entered the core issue was always BCBSM's right to collaterally attack. This is amply demonstrated by BCBSM's reliance upon *Kalb* at each stage of the proceedings.

(App. C at 38). *See Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982). Mr. Weiner, who ran a service station as a sole proprietor (R. 5442, 5503), had purchased insurance solely to provide coverage for his family. (R. 1504-05, 1509, 1525-26, 1627, 5451).[4] He had never provided health care benefits for his employees. In addition, while the insurance Mr. Weiner purchased from BCBSM purported to be part of a plan established by an association of employers known as the Service Station Dealers of America ("SSDA"), this turned out to be a fraudulent marketing scheme. The group policies making up the "plan" were actually entered into between BCBSM and Associated Financial Services, Inc. ("AFSI"), an insurance broker. (PX 29, 30, 31). SSDA was never consulted about the plan, it never gave anyone permission to use its name, and its signature was forged on the group policies by the President of AFSI. (R. 2004-2007, 2020-2021, 2038-2039). No agreements were ever entered into with any associations of service station dealers or other employer groups. (R. 2039-2040; PX 27). Thus, while the insurance was marketed as an SSDA plan, it was nothing more than an arrangement between two entrepreneurial businesses to sell insurance to service station operators.[5]

---

[4] Citations are to the record before the Florida appellate court. "R" designates references to trial or deposition testimony, and "PX" designates plaintiffs' exhibits introduced at trial.

[5] In its statement of the case BCBSM suggests that the Florida appellate court should not have decided the ERISA preemption issue on the record before it. Apart from the fact that this point was raised in BCBSM's last petition to this

(Continued on following page)

BCBSM sought discretionary review of the Florida appellate court's decision in the Supreme Court of Florida, which denied review on October 24, 1989. 553 So.2d 1164 (1989). BCBSM then petitioned this Court to issue a writ of certiorari to review the merits of the Florida appellate court's ERISA preemption determination. The petition was denied on March 19, 1990. ___ U.S. ___, 110 S. Ct. 1475, 108 L.Ed. 2d 612 (1990).

Because the Weiners' judgment was a Florida judgment and BCBSM's assets were in Maryland, the case did not end there. The Weiners were forced to file a Maryland action to enforce their Florida judgment. BCBSM removed the action to the United States District Court for the District of Maryland and launched its second collateral attack by filing a motion to vacate the judgment on the grounds of ERISA preemption.

The district court denied the motion to vacate, finding that *Kalb* did not permit a collateral attack in situations where state courts were empowered and required to determine if their jurisdiction had been preempted by federal law as opposed to situations where federal law

---

(Continued from previous page)

Court, the Florida appellate court was doing exactly what BCBSM requested. Had the decision gone the other way BCBSM would not be grumbling about an incomplete record. Moreover, appellate courts must decide preemption issues when they are raised for the first time on appeal, *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380 (1986), and frequently do. *E.g., Kanne v. Connecticut General Life Ins. Co.*, 867 F.2d 489 (9th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989).

automatically ousted them from jurisdiction and precluded any further action on their part. (App. B. at 22-23, 26).

BCBSM appealed the district court's decision to the Fourth Circuit, which affirmed. The Fourth Circuit did not, as BCBSM suggests, question the continued vitality of *Kalb*. Rather, it simply agreed with the district court that *Kalb* was inapplicable because in enacting ERISA Congress had not, as it had in the *Kalb* scenario, withdrawn the power to make the threshold jurisdictional decision from the state courts. (App. A. at 4-5). In addition, the Fourth Circuit did not, as BCBSM states, assume that an ERISA plan existed.[6] To the contrary, it determined "on the merits [that] there were no grounds sufficient to justify disregard of the [Florida appellate court's decision]". (App. A at 5).

BCBSM's Petition for Rehearing with Suggestion for Rehearing In Banc was denied on March 1, 1990 (App. D), and BCBSM satisfied the judgment.

REASONS FOR DENYING THE WRIT

1. The Decision Below Neither Effectively Overrules *Kalb v. Feuerstein* Nor Raises Significant Questions of Federal Law

The Full Faith and Credit Act, 28 U.S.C. §1738, requires federal courts to give full faith and credit to state

---

[6] What the Fourth Circuit assumed was that the Weiners' state court claims would have been preempted under *Pilot Life if* a plan had existed. (App. A. at 3-4).

court judgments. The principles of *res judicata* this invokes provide, *inter alia*, that a court's determination of its own subject matter jurisdiction is *res judicata*, i.e., binding and not subject to collateral attack, even if that determination is wrong. As this Court stated in *Stoll v. Gottlieb*, 305 U.S. 165 (1938), in reversing the Supreme Court of Illinois' refusal to give *res judicata* effect to a bankruptcy court's judgment which exceeded its subject matter jurisdiction:

> When an erroneous judgment, whether from the court of first instance or from the court of final resort, is pleaded in another court or another jurisdiction the question is whether the former judgment is res judicata. . . . We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation.
>
> * * *
>
> '[The jurisdictional question] was a question which the [court] was competent to determine in the first instance. Its determination of it was the exercise of jurisdiction. Even if that court erred in entertaining jurisdiction, its determination of the matter was conclusive upon the parties before it, and could not be questioned by them or either of them collaterally. . . . '

Id. at 172, 175, *citing Dowell v. Applegate*, 152 U.S. 327 (1894).

The teaching of *Kalb* is that Congress may create exceptions to the above rule, and that it does so when it withdraws a state court's power to make even a threshold

determination as to its own jurisdiction. In *Kalb*, the Wisconsin Supreme Court refused to permit a collateral attack upon final judgments of foreclosure entered after the mortgagors had filed for bankruptcy, noting that the trial court's jurisdictional decision, even if erroneous, was "within the power of the court to make". 308 U.S. at 438. While acknowledging the general principle, this Court held:

> But if appellants are right in their contention that the Federal Act of itself, from the moment the petition was filed and so long as it remained pending, operated . . . to oust the jurisdiction of the state court so as to stay its power to proceed . . . the action of the [state court] was not merely erroneous but was beyond its power, void, and subject to collateral attack.
>
> * * *
>
> The wisdom and desirability of an automatic ouster of jurisdiction of all except bankruptcy courts over farmer debtors and their property were considerations for Congress alone.
>
> We think the language and broad policy of the Frazier-Lemke Act conclusively demonstrate that Congress intended to, and did deprive [state courts] of the power and jurisdiction to continue or maintain in any manner foreclosure proceedings against appellants. . . .

308 U.S. at 438, 439-440.

The character of the decision below thus depends upon whether Congress intended to automatically oust state court jurisdiction when an issue of ERISA preemption is raised or to otherwise render state court decisions on the subject a nullity. The *Kalb* Court gleaned congressional intent directly from the Bankruptcy or Frazier-

Lemke Act, 47 Stat. 1470, *as amended* 49 Stat. 942, 943, which provided that:

> The filing of a petition . . . shall immediately subject the farmer and all his property, wherever located . . . to the exclusive jurisdiction of the court. . . .

308 U.S. at 440. On the other hand, while Congress could have provided that a claim of ERISA preemption immediately subjects the parties to the exclusive jurisdiction of the federal courts, or that federal courts alone are competent to determine whether an ERISA plan or preemption exists, it did not.

To the contrary, Congress intentionally involved state courts in this decision making process. For example, Congress gave state courts concurrent jurisdiction over actions by participants to clarify rights or obtain benefits due under an ERISA plan. 29 U.S.C. § 1132(a)(1)(b), (e)(1). This grant of jurisdiction presumes both the power and the ability to determine if an employee benefit plan exists in the first place. Similarly, Congress provided that state laws regulating insurance would not be preempted by ERISA, but that certain employee benefit plans could not be deemed to be in the insurance business. 29 U.S.C. § 1144(b)(2)(A)-(2)(B). Again, this presumes that state courts will have the power and ability to identify ERISA plans in the enforcement of their own insurance laws.

In keeping with the intent of Congress, the lower federal courts have repeatedly held that state courts can properly determine whether claims before them have been preempted by ERISA. *See, e.g., Transamerica Occidental Life Ins. Co. v. Digregorio*, 811 F.2d 1249, 1255 n.5 (9th Cir. 1987) ("[T]he state courts are perfectly competent to

decide this issue"); *Takeda v. Northwestern Nat'l Life Ins. Co.*, 765 F.2d 815, 822 n.10 (9th Cir. 1985) ("[T]he state court to which we remand this case is fully capable to decide issues of preemption if defendants continue to assert them"); *Johansen v. Employee Benefit Claims, Inc.*, 668 F.Supp. 1294, 1297 (D. Minn. 1987) ("If defendants are correct that the *Dedeaux* and *Taylor* cases provide a federal preemption defense and that ERISA and not state law controls, the state court will be bound to apply federal law"); *Browning Corp. Int'l v. Lee*, 624 F.Supp. 555, 557 (N.D. Tex. 1986) ("[S]tate courts as well as federal courts are of competent jurisdiction to determine whether a particular plan is governed by ERISA and therefore not by state law").

Similarly, this Court has mandated that state courts make the threshold federal preemption decision in the analogous context of preemption under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*[7] In *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380 (1986), an employee filed a common law fraud action against a union in an Alabama state court. The union did not raise the issue of federal preemption until after trial, and the Alabama courts refused to consider it for procedural reasons. In holding that the Alabama courts erred in refusing to consider the issue, the Court commanded that when a claim of federal preemption is raised

> it must be considered and resolved by the state court.

---

[7] The Court equated the preemptive power of ERISA and the NLRA in *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

Id. at 393.[8] *Accord, Hathorn v. Lovorn*, 457 U.S. 255 (1982). The rule is no different with ERISA preemption.[9]

Finally, state courts are routinely determining whether claims pending before them are preempted by ERISA when the issue is raised,[10] and this Court has cited

---

[8] In footnote 7 of its Petition BCBSM suggests that the *Davis* court found NLRA preemption and bankruptcy preemption to be the same. Not so. As noted above, in *Davis* the Court held that the state court must decide the NLRA preemption issue, whereas in *Kalb* the Court held that the state court could not decide the bankruptcy preemption issue. The quotation from *Davis* is taken out of context and refers to a question faced in both *Davis* and *Kalb* but not here – whether state procedural rules requiring jurisdictional defenses to be raised or waived constitute an independent and adequate state ground of decision so as to preclude review by this Court. 476 U.S. at 393, 393 n.11.

[9] This is an inescapable corollary of the Court's decision in *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987), where an ERISA preemption defense was held to justify federal question removal. Removal is not self-executing, and if the state court action is not removed, as was the case here, the state court must, perforce, resolve the question of ERISA preemption.

[10] *See, e.g., Hood v. Prudential Ins. Co. of America*, 522 So.2d 265 (Ala. 1988); *Bruenn v. Aetna Life Ins. Co.*, 197 Cal. App. 3d 1000, 243 Cal. Rptr. 262 (Cal. App. 2 Dist. 1987); *Peick v. Murray*, 141 Ill. App. 3d 1081, 491 N.E. 2d 100 (Ill. App. 1 Dist. 1986); *Barry v. Dymo Graphic Systems, Inc.*, 394 Mass. 830, 478 N.E. 2d 707 (Mass. 1985); *Providence Hosp. v. National Labor Union Health and Welfare Fund*, 162 Mich. App. 191, 412 N.W. 2d 690 (Mich. App. 1987); *Turnbow v. Pacific Mut. Life Ins. Co.*, 765 P.2d 1160 (Nev. 1988), *cert. denied*, 490 U.S. 1102, (1989); *Richland Hosp. Inc. v. Ralyon*, 33 Ohio St. 3d 87, 516 N.E. 2d 1236 (Ohio 1987); *E-Systems, Inc. v. Taylor*, 744 S.W. 2d 956 (Tex. App. – Dallas 1988).

their decisions with approval. *E.g., Mackey v. Lanier Collections Agency & Service*, 486 U.S. 825, 832 n.6, 833 n.8 (1988).

The difference between *Kalb* and this case is thus manifest. Rather than precluding state court participation once the question of exclusive federal jurisdiction is raised as it did in the Frazier – Lemke Act, Congress intended and the federal courts have held that state courts are to resolve the issue of ERISA preemption and proceed accordingly. Congressional intent that the state court decisions which result be null and void can hardly be found in these circumstances, and absent such intent *Kalb* does not sanction a collateral attack. Accordingly, the decision below represents no more than a straightforward application of *Kalb*.[11]

---

[11] *Consolidated Rail Corp. v. Illinois*, 423 F.Supp. 941 (Regional Rail Reorg. Ct. 1976), *cert. denied*, 429 U.S. 1095 (1977), relied upon by BCBSM, also demonstrates that the decision concerning whether a collateral attack is permissible must be made in the context of congressional intent. The issue was whether a federal district court's determination that it had jurisdiction over a railway dispute could be collaterally attacked in a Special Court formulated pursuant to the Regional Rail Reorganization Act, 45 U.S.C. § 701 *et seq.* ("RRRA"). The Special Court acknowledged that the federal district court's jurisdictional decision would normally be *res judicata*, but pointed out that *Kalb* stands for the proposition that "the legislature may void judgments." 423 F.Supp. at 948. Since the RRRA did not automatically oust the district court's jurisdiction, however, the Special Court accurately concluded that "*Kalb* . . . does not control our determination here". 423 F.Supp. at 948. Nonetheless, the Special Court followed the broader teaching of *Kalb* and looked to the RRRA for an answer.

(Continued on following page)

To promote a contrary appearance BCBSM asserts that, rather than holding that Congress can and has in some contexts acted to void state court judgments, *Kalb* stands for the much broader proposition that any state court judgment alleged to infringe upon exclusive federal jurisdiction is subject to collateral attack. No case law is cited for this proposition, and none exists. To the contrary, this Court has characterized the *Kalb* holding as a limited one – standing for the proposition that "[d]octrines of federal preemption . . . *may in some contexts be controlling.*" *Durfree v. Duke*, 375 U.S. 106, 114 (1963) (emphasis added) (citations omitted).[12]

(Continued from previous page)

The Special Court's conclusion that the RRRA authorized a collateral attack was based upon the extreme need for uniformity Congress demonstrated by entrusting exclusive jurisdiction to only one court in the entire nation, the emergency nature of the situation which rendered the normal appellate process inadequate, and the extraordinary power Congress conferred on the Special Court by authorizing it to enjoin any court in the land save this Court. Once again, the contrast between the RRRA and ERISA is striking, and highlights the straightforward nature of the decision below. First, Congress did not entrust ERISA claims or ERISA preemption determinations to one court, but to all state and federal courts. Second, ERISA was not enacted to resolve a short term crisis but for the long haul, evidencing no need to bypass the normal appellate process. Finally, Congress did not authorize federal courts to enjoin state court ERISA preemption determinations. To the contrary, they may not. *Blue Cross and Blue Shield of Maryland, Inc. v. Weiner*, 868 F.2d 1550 (11th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 239 (1989).

[12] In keeping with this view of *Kalb* the Court has held in a related context that state court judgments involving claims

(Continued on following page)

Moreover, despite BCBSM's assertions to the contrary, the commentators have recognized both that *Kalb* was a product of congressional intent as reflected in the bankruptcy legislation at issue, and that its principles apply in some, but not all contexts in which federal law preempts state court jurisdiction. For example, Professor Karen Nelson Moore observes that:

> [The *Kalb* decision] should be viewed as an exception to the modern doctrine of finality based on a policy extrinsic to the judicial system: The congressional mandate that federal bankruptcy petitions *automatically deprive state courts of subject matter jurisdiction.*

Moore, *Collateral Attack on Subject Matter Jurisdiction: A Critique of the Restatement (Second) of Judgments*, 66 Cornell L. Rev. 534, 542 (1981) (emphasis added). *Accord*, Boskey & Braucher, *Jurisdiction and Collateral Attack*, 40 Colum. L. Rev. 1006, 1018 (1940). Likewise, Wright, Miller and Cooper explain:

> Violation of exclusive federal jurisdiction, however, *may* leave a state judgment vulnerable to collateral attack. The leading case is *Kalb v. Feuerstein* [where] the Supreme Court ruled that the federal proceedings operated as an *automatic stay of the state court proceedings* so that the state judgment was 'beyond its power, void, and subject to collateral attack.' . . . There *may* be other settings as well in which similar results follow

---

(Continued from previous page)

within exclusive federal jurisdiction are not necessarily subject to collateral attack – the determining factor again being the intent of Congress. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380-381 (1985).

> from the preemptive effects of exclusive federal jurisdiction.

18 Wright, Miller & Cooper, *Federal Practice & Procedure*, § 4428 at 283-285 (1981) (emphasis added). And in characterizing *Kalb*, Moore notes that:

> It has been held in *an occasional case* that competing considerations dictate that collateral attack on jurisdictional grounds be permitted.

1B *Moore's Federal Practice*, § 0.405 [4.-1] at 215 (2d ed. 1991) (emphasis added).

Given the above, the Fourth Circuit's decision can be seen neither as a challenge to the continued vitality of *Kalb* nor as the source of any significant questions of federal law in need of resolution by this Court.

2. The Decision Below Does Not Conflict With Existing Federal Law

When the focus is properly placed on federal preemption decisions state courts are supposed rather than forbidden to make, the decision below becomes just one of many that have found state court decisions concerning federal preemption or exclusive federal jurisdiction *res judicata* and immune from collateral attack.

In *Texas Employers' Ins. Assoc. v. Jackson*, 820 F.2d 1406 (5th Cir. 1987), *modified on reh'g*, 862 F.2d 491 (1988), the federal plaintiff sought declaratory and injunctive relief to stop an action in a state court whose jurisdiction it claimed was preempted by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, a form or preemption the Fifth Circuit found to be as powerful as ERISA preemption. The state trial court had

already considered and rejected the preemption defense in an interlocutory ruling, but the state proceedings had not gone to judgment. The Fifth Circuit declined to accord the state court interlocutory ruling *res judicata* effect, but acknowledged that if, as is the case here, there had been a final judgment, *res judicata* would have barred it from reconsidering the state court's ruling on the preemption issue:

> Thus, if the state court's ruling was a final one,we ourselves are bound by that determination.

820 F.2d at 1421.

In *Alleghany Corp. v. Kirby*, 340 F.2d 311 (2d Cir. 1965), *cert. dismissed*, 384 U.S. 28 (1966), the plaintiff sought to set aside a state court judgment on the grounds that the security claims made in state court were within the exclusive jurisdiction of the federal courts. The Second Circuit declined to set the judgment aside because "the issue of jurisdiction was raised in and decided by the New York Courts". *Id.* at 312 n.1. Likewise, in *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1143 n.8 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1987), the Second Circuit held that it was error for the district court to deny *res judicata* effect to the Texas court's rejection of Texaco's defense that Pennzoil's claims were preempted by exclusive federal jurisdiction under the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* And in *Hobbs v. United States Offices of Personnel Management*, 485 F.Supp. 456 (M.D. Fla. 1980), the plaintiff's claim that a California court lacked subject matter jurisdiction to award part of his Federal Retirement Fund pension to his wife was rejected on the basis of *res judicata*.

In an ERISA context, the debtors asked a bankruptcy court in *In Re Ross*, 81 B.R. 473 (Bkrty N.D. Ill. 1988), to disallow a claim on the grounds that the state court judgment upon which it was based was void by reason of ERISA preemption. Relief was denied and the claim allowed on the basis of *res judicata*. Similarly, in *Simmons v. Diamond Shamrock Corp.*, 844 F.2d 517 (8th Cir. 1988), while the Eighth Circuit refused to give collateral estoppel effect to a state court judgment challenged on the basis of ERISA preemption in a subsequent action between different parties, the court noted that the state court judgment was not an "abuse of authority" and "would be immune from collateral attack" as between the original parties. *Id.* at 520 n.5.

These cases demonstrate not only the absence of conflict among the lower federal courts but, again, the routine nature of the Fourth Circuit's decision in this case.

3. The Decision Below Does Not Hinder Federal Review of State Court ERISA Preemption Determinations

BCBSM's suggestion that the Court should authorize federal collateral attacks upon state court ERISA preemption determinations to prevent Congress' regulatory scheme from being undermined is far-fetched. First, Congress intentionally included the state courts in its regulatory scheme. Second, this Court has rejected the notion the federal rights, including those involving federal preemption and exclusive federal jurisdiction, "will not be adequately protected in state courts". *Amalgamated*

Clothing Workers of America v. Richman Brothers, 348 U.S. 511, 518 (1955); *Accord, Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988). Third, direct review of state court decisions is available in this Court, and has been undertaken when necessary. *E.g., FMC Corp. v. Holliday*, ___ U.S. ___, 111 S. Ct. 403, 112 L.Ed.2d 356 (1990); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. ___, 111 S.Ct. 478, 112 L.Ed. 2d 474 (1990). Fourth, a party wishing to have a federal rather than a state court make the ERISA preemption determination may remove the case to federal court. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

CONCLUSION

For the above reasons, it is respectfully submitted that BCBSM's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

LARRY S. STEWART
Counsel of Record
JAMES B. TILGHMAN, JR.
STEWART TILGHMAN FOX & BIANCHI, P.A.
44 West Flagler St.
Suite 1900
Miami, Florida 33130
(305) 358-6644

Attorneys for Respondents

June 27, 1991